Supreme Court of the United States

OCTOBER TERM, 1943.

No. 244

THE MORRISDALE COAL COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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CITATIONS.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, The Morrisdale Coal Company, a corporation, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania was filed on June 22, 1942 (R. 81-83), and is reported at 46 F. Supp. 356. That Court subsequently entered a supplemental opinion on Sep-

tember 23, 1942 (R. 84-85) dealing with the amount of the judgment to be entered herein which is reported at 50 F. Supp. 138.

The *per curiam* opinion of the United States Circuit Court of Appeals for the Third Circuit was filed on May 10, 1943 (R. 95), and is reported at 135 F. 2d 921.

JURISDICTION.

The judgments of the United States Circuit Court of Appeals for the Third Circuit were entered on May 10, 1943 (R. 96-97).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

May the United States recover from petitioner and petitioner's surety upon a common law bond given solely for the protection of and naming as obligee only "Blakely D. McCaughn, Collector, First District, Pennsylvania"?

STATUTES INVOLVED.

The statutes involved are Sections 3651, 3943, and 3950 of the Internal Revenue Code which are set out in the Appendix, *infra,* pages 12 to 14.

STATEMENT OF THE CASE.

In 1921 Blakely D. McCaughn, the then Collector of Internal Revenue for the First District of Pennsylvania (R. 89, 93), demanded payment of additional income taxes which had been assessed against The Morrisdale Coal Company for the fiscal years ending in 1917 and 1918 (R. 6, 22, 69). That company concurrently filed abatement claims covering the full amount of the assessments (R. 7, 23, 33-34, 63, 69).

Mr. McCaughn acknowledged receipt of these claims and advised the coal company that:

> * * * these claims will not serve to withhold the collection of such taxes unless you furnish this office with a corporate surety bond covering the full amount of the claims. Enclosed you will find copy of the opening and closing paragraphs which must be embodied in the surety company's form. (R. 69.)

The coal company then advised McCaughn of a conference which its officials had had in Washington, D. C., with the Bureau of Internal Revenue in which it had been indicated that action upon the abatement claims would soon be taken. The company, therefore, requested McCaughn to withdraw his request for a bond. (R. 70.)

McCaughn's authorized deputy collector (R. 89) replied as follows:

> * * * this office is not familiar with the conference with the Revenue Department in Washington, to which you refer.
>
> Inasmuch as the above tax has been assessed on the lists of this office the Collector for this district *is personally responsible* for the collection or adjustment of all such assessments. Consequently he requires the filing of a corporate surety bond made *in his favor for his own protection* in the event that your claim is disallowed by the Department. (R. 71; italics supplied.)

McCaughn throughout his tenure of office was under a statutory bond to the United States which he had given to secure the faithful performance of all the duties of his office (R. 75-78, 90).

On December 1, 1921, the coal company, as principal, and the American Re-Insurance Company, as surety, delivered to McCaughn "for his sole protection" (R. 65) the common law bond involved in this proceeding which bond embodied the opening and closing paragraphs dictated by McCaughn (R. 10-11, 69-70).

Prior to March of 1925 the additional taxes assessed against the coal company for 1917 were abated in part and the balance paid (R. 6, 22, 63, 81, 86).

On March 30, 1925, the Commissioner of Internal Revenue rejected the coal company's 1918 abatement claim (R. 34) and notified the company of such action by letter dated April 8, 1925 (R. 66-68). The statute of limitations on the collection of the 1918 tax, which had been assessed in 1921, as extended by a waiver (R. 50, 63), barred collection after April 30, 1925. Sections 250(d) of the Revenue Acts of 1918 and 1921.

McCaughn left office on December 31, 1927 (R. 89, 93), and by June 2, 1928, his liability to the United States had been settled in full (R. 80, 90). On March 13, 1933, the surety on the statutory bond given by McCaughn was released by operation of law (R. 79). 6 U. S. C. A. Sec. 5.

On May 15, 1939, the United States, alleging it was the real party in interest, instituted this suit in the District Court of the United States for the Eastern District of Pennsylvania against the coal company and the surety company on the common law bond delivered by them to McCaughn (R. 4-11). Thereafter, by a consent order entered by the Court, the surety company deposited the principal of the bond (with interest) in the registry of the District Court (R. 2, 86) and was permitted to withdraw. Said order provided that the coal company should have the right to defend on the ground that neither it nor the surety company is liable upon the cause of action alleged (R. 26-27).

The case was heard on a motion for summary judgment filed by the United States (R. 27-28) and a motion to dismiss filed thereafter by the coal company (R. 61-62). The District Court granted the motion for summary judgment as to that part of the bond covering the taxes assessed against the coal company for the year ending in 1918 (R. 85-86). The United States Circuit Court of Appeals for the Third Circuit affirmed, *per curiam,* the judgments of the District Court (R. 95).

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In failing to find and hold that the bond sued on was requested and given solely for the personal protection of Blakely D. McCaughn.

2. In failing to construe the bond, if ambiguous, against the United States, since the material parts of it were dictated by the obligee under whom the United States claims.

3. In granting the motion for summary judgment when the evidence presented either showed as a fact that the bond sued on was not given for the benefit of the United States or presented a genuine issue of a material fact regarding this question.

4. In holding the United States to be the real party in interest in the bond.

5. In failing to hold that the Collector of Internal Revenue was a separate entity from the United States.

6. In failing to hold, in any event, that the surety company was liable on the bond only to the named obligee, McCaughn.

REASONS FOR GRANTING THE WRIT.

1. The petition should be granted because the question is of general importance in the construction of Rules 17(a) and 56(c) of the Federal Rules of Civil Procedure and in the application of the law of suretyship to bonds given to secure the payment of federal taxes.

2. In *United States* v. *Kales*, 314 U. S. 186, and *United States* v. *Nunnally Investment Co.*, 316 U. S. 258, this Court held that a collector of internal revenue is a separate entity from the United States when in Court as a defendant. The case at bar conflicts in principle with those decisions because it ignores the separate identity of the collector as a plaintiff. The relationship of the United States and a col-

lector—when plaintiffs—should be settled by this Honorable Court to round out the cited cases.[1]

3. The decision below in holding that the United States, though not mentioned in the common law bond, may sue on that instrument is in direct conflict with decisions of the United States Circuit Courts of Appeals for the Second and Eighth Circuits where it has been held that in the absence of some enabling statute the obligee named in a bond must sue upon it. *Bowers* v. *American Surety Co.*, 2 Cir., 30 F. 2d 244; *United States* v. *National Surety Corp.*, 8 Cir., 103 F. 2d 450, affirmed 309 U. S. 165; cf. *Reconstruction Finance Corporation* v. *Teter*, 7 Cir., 117 F. 2d 716, 728, cert. den. 314 U. S. 620. In line with the holdings in the cases just cited is the opinion of the District Court in *Moody* v. *Megee*, S. D. Tex., 31 F. 2d 117, affirmed, 5 Cir., 41 F. 2d 515, where the United States sought unsuccessfully to recover on a statutory bond naming as obligee only the Governor of Texas.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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August, 1943.

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[1] Congress in Section 503 of the Revenue Act of 1942, 56 Stat. 811, has provided that a suit *against* a collector shall be treated as one against the United States in applying the doctrine of res judicata. This legislation, however, does not appear to affect in any way the status of the collector and the United States as plaintiffs.